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FENNEMORE CRAIG
A Professional Corporation
Patrick J. Black (No. 017141)
Mark R. Bolton (No. 026204)
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012
Telephone (602) 916-5000

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ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission

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Attorneys for BNSF Railway Company

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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
OF THE CITY OF FLAGSTAFF TO
UPGRADE EXISTING RAILROAD
CROSSING OF THE BNSF RAILWAY
COMPANY AT STEVES BOULEVARD
AND FANNING DRIVE IN THE CITY OF
FLAGSTAFF, COCONINO COUNTY,
ARIZONA DOT CROSSING NOS. 025099J
AND 025129Y

DOCKET NO. RR-02635B-09-0075

**APPLICATION FOR REHEARING
OF DECISION NO. 71306**

INTRODUCTION

Pursuant to A.R.S. § 40-253, BNSF Railway Company ("BNSF") hereby submits this Application for Rehearing of Decision No. 71306 (October 21, 2009) (the "Decision") in the above-captioned matter. In support of this Application, BNSF incorporates by reference its Post-Hearing Brief filed on October 12, 2009.

In the Decision, the Commission concluded in Finding of Fact No. 101 that the Federal Railroad Administration's ("FRA") rules governing the use of locomotive horns at public highway-rail grade crossings ("Train Horn Rules"), as set forth in 49 C.F.R. Part 222, do not preempt the Arizona Corporation Commission's procedures for processing applications for modifications or alterations of public at-grade crossings included (or to be included) within Quiet Zones. Hence, the Commission retains the authority to approve or deny applications for alterations at such crossings to the extent they represent engineering

1 modifications or installations.¹ Decision at 31-32. The Decision further holds in Finding
2 of Fact No. 97 that the installation of a wayside horn is a modification to a public
3 highway-rail grade crossing, and therefore represents a modification or installation of
4 engineering improvements over which the Commission retains authority under 49 C.F.R.
5 Part 222.7(e). *Id.* at 30.

6 There are two primary flaws that render the Decision unlawful. First, the
7 Commission is preempted by federal law from approving or denying the installation of a
8 wayside horn at any public highway-rail grade crossing, whether or not included within a
9 Quiet Zone. Second, the Commission acts in a judicial manner – not an administrative
10 one – when it conducts hearings, obtains evidence and acts upon recommendations
11 provided by its Hearing Division. As a consequence, even in the event state jurisdiction
12 applies, the Commission does not retain the requisite authority under 49 C.F.R. Part
13 222.7(e) to approve or deny the installation of wayside horns at public highway-rail grade
14 crossings.

15 DISCUSSION

16 BNSF asserts that the Commission is without jurisdiction to adopt the Findings of
17 Fact at ¶ 97 and 101 because: (1) wayside horns at public highway-rail grade crossings are
18 one-for-one substitutes for a locomotive horn, and their use and installation is governed by
19 federal rules and procedures; and (2) although 49 C.F.R. Part 222.7(e) allows for State
20 administrative procedures that govern the modification or installation of engineering
21 improvements at public highway-rail crossings, the Commission's hearing process, which
22 results in legal findings, is not an administrative procedure under Arizona law, and
23 therefore does not fall under the exemption granted under federal law.

24
25
26 ¹ Decision No. 71306, Conclusion of Law No. 7.

1 **I. 49 C.F.R. Part 222.59 Governs the Procedure for Installing Wayside Horns at**
2 **Public Highway-Rail Grade Crossings.**

3 49 CFR part 222.59(a)(1) states that “A wayside horn conforming to the
4 requirements of appendix E of this part may be used in lieu of a locomotive horn at any
5 highway-rail grade crossing equipped with an active warning system consisting of, at a
6 minimum, flashing lights and gates.” Nothing in 49 C.F.R. Part 222.59 requires that a
7 Public Authority or railroad obtain authorization from the state agency with responsibility
8 for public crossing safety before installing the wayside horn, whether or not the public
9 highway-rail grade crossing is included within a quiet zone. The only requirement set
10 forth in 49 C.F.R. Part 222.59 is one of notice.

11 For wayside horns to be installed at public highway rail grade crossings within a
12 quiet zone, 49 C.F.R. Part 222.59(b) requires that a Notice of Intent (NOI) be sent to all
13 railroads operating over the public crossing, the highway or traffic control authority or law
14 enforcement authority having control over traffic, any landowner having control over any
15 private crossings within the quiet zone, the State agency responsible for public crossing
16 safety, the State agency responsible for highway and road safety, and the FRA’s Associate
17 Administrator. The NOI must contain information regarding the date on which the
18 wayside horn will become operational and the identification of the public crossing by both
19 the U.S. DOT National Highway Grade Crossing Inventory Number and street or highway
20 name, and must be provided at least twenty-one (21) days in advance of the wayside horn
21 becoming operational. 49 CFR Part 222.59(b). The requirements for installing a wayside
22 horn at a public crossing outside a quiet zone are identical, except that no private
23 landowners are required to receive a copy of the NOI. 49 CFR Part 222.59(c).

24 The Commission concedes that the FRA’s Train Horn Rules preempt state
25 authority over safety at public highway-rail grade crossings “as specifically related to the
26 sounding of train horns...” Decision at 32. The FRA has determined that a wayside horn

1 will be considered a one-for-one substitute for the train horn.² The only purpose for a
2 wayside horn is to produce the noise required by 49 CFR Part 222, and need only conform
3 to the federal requirements contained in Appendix E (e.g. it can only be installed at a
4 public highway-rail grade crossing equipped with an active warning system that has, at a
5 minimum, flashing lights and gates). By asserting jurisdiction over the installation of
6 wayside horns, including the authority to approve or *deny* such applications as noted in
7 Findings of Fact No. 101, the Commission would effectively be determining whether the
8 use of a wayside horn is in the public interest. The FRA has already determined at a
9 federal level that the use of wayside horns as a one-for-one substitute is consistent with
10 the public health and safety when it adopted the final Train Horn Rules after extensive
11 public comment. In fact, the existence of a wayside horn at a public highway-rail grade
12 crossing has absolutely no effect on the FRA's safety-related Quiet Zone Risk Index. By
13 contrast, safety measures that have been approved as Supplemental Safety Measures
14 ("SSMs") were assigned effectiveness rates, and when implemented, have a demonstrated
15 effect on reducing collision risk.³

16 **II. Arizona Case Law Establishes that the Commission's Hearing and Approval**
17 **Process is a Judicial or Quasi-judicial Process, not an Administrative One.**

18 Despite citations to two Arizona Supreme Court cases holding that the Commission
19 acts judicially, or in a quasi-judicial capacity, when rendering decisions or orders, the
20 Decision nonetheless concludes that the Commission's process is an "administrative one."
21 Decision at footnote 33. Unfortunately, the Decision fails to provide any reasoning, legal
22 basis or case law to reject the legal tenet that the Commission's hearing and approval
23 process is judicial or quasi-judicial in nature.

24
25 ² "Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule," 70 Federal Register
26 80 (April 27, 2005), p. 21845.

³ *Id.*

1
2 In *Arizona Public Service Co. v. Southern Union Gas Co.*, 76 Ariz. 373, 377, 265
3 P.2d 435, 438 (1954), the Court held that “the corporation commission in rendering its
4 decision **acts judicially** and any matters decided are conclusive, subject only to court test
5 in the manner provided by section 69-247, supra, and in the absence of pursuing such
6 remedy the decision is not subject to collateral attack.” [Emphasis added]. Likewise, in
7 *Johnson v. Betts et al., Corporation Commission*, 21 Ariz. 365, 371, 188 P. 271, 273
8 (1920), the Court held that “The commission, in hearing evidence in proof of the charge
9 laid against appellant, and evidence submitted by appellant in rebuttal thereof, and in
10 coming to a decision of the question, was acting in a **judicial or quasi judicial**
11 capacity...”. [Emphasis added].

12 The distinction between an administrative and judicial process is an important one.
13 In adopting the Train Horn Rule, the FRA established a federal uniform set of regulations
14 concerning the sounding of train horns at public highway-rail grade crossings. These
15 regulations set forth requirements for the sounding of train horns, and the exceptions
16 thereto – including the establishment of quiet zones or use of wayside horns. If an
17 individual state retains the authority to deny or prohibit the use of a wayside horn that
18 conforms to the requirements of 49 C.F.R. Part 222, Appendix E, it would conceivably be
19 substituting its decision concerning the sounding of train horns at public crossings for that
20 already made at the federal level.⁴

21
22
23 ⁴ While the Federal Railway Safety Act provides that rules regulating railroad safety “shall be
24 nationally uniform to the extent practicable,” States are permitted to adopt a more stringent law,
25 regulation, or order related to railroad safety when the law, regulation, or order “(1) is necessary
26 to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law,
regulation, or order of the United States Government; and (3) does not unreasonably burden
interstate commerce.” 49 U.S.C. § 20106(a)(2). The Commission has not met these requirements.

1 **CONCLUSION**

2 BNSF contends that federal law governs the installation of wayside horns at public
3 highway-rail grade crossings, and that the Commission is without any authority under the
4 current federal scheme to approve or deny such installations whether located within or
5 outside quiet zones. BNSF requests that the Commission grant this Application and
6 amend the Decision to be consistent with the analysis provided for herein.

7 RESPECTFULLY SUBMITTED this 9th day of November, 2009.

8 FENNEMORE CRAIG, P.C.

9
10 By: 

11 Patrick J. Black

12 Mark R. Bolton

13 Attorneys for BNSF Railway Company

14 **ORIGINAL** and 13 copies filed
15 this 9th day of November, 2009 with:

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

20 **COPY** hand-delivered
21 this 9th day of November, 2009 to:

22 Sarah N. Harpring, ALJ
23 Hearing Division
24 Arizona Corporation Commission
25 1200 West Washington Street
26 Phoenix, Arizona 85007

Charles Hains
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

1 Brian Lehman, Chief
2 Railroad Safety Section
3 Arizona Corporation Commission
4 1200 West Washington Street
5 Phoenix, Arizona 85007

6 **Copy** sent via mail
7 this 9th day of November, 2009 to:

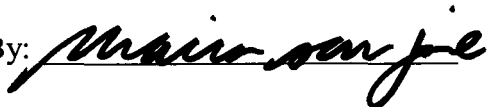
8 David A. Womochil
9 Flagstaff City Attorney's Office
10 211 West Aspen Avenue
11 Flagstaff, AZ 86001

12 Randy Whitaker, Senior Project Manager
13 Traffic Engineering, City Of Flagstaff
14 City Hall
15 211 West Aspen Avenue
16 Flagstaff, AZ 86001

17 Robert Travis, PE, State Railroad Liaison
18 Utilities & Railroad Engineering Section
19 Arizona Department of Transportation
20 205 South 17th Avenue, Mail Drop 61 8E
21 Phoenix, AZ 85007

22 Traffic Records Section
23 Arizona Department of Transportation
24 206 South 17th Avenue, Mail Drop 064R
25 Phoenix, AZ 85007

26 Walter Robertson
1690 North Falcon Road
Flagstaff, AZ 86004

By: 

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